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No. 1127

SUPREME COURT OF THE UNITED STATES

October Term, 1946

DIMAS YGNACIO YBARRA AMAYA, ET AL
Petitioners

v.

STANOLIND OIL & GAS COMPANY, ET AL
Respondents

PETITIONERS' MOTION FOR REHEARING ON THEIR PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. B. CHAPIN,
P. O. Box 256
Mission, Texas
Attorney for Petitioners

ELLERY GARLAND BROWN,
LEWIS B. PERKINS
Of Counsel for Petitioners.

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**TO THE HONORABLE, THE SUPREME COURT
OF THE UNITED STATES:**

Comes now the petitioners in the above styled and numbered cause and respectfully files this, their Motion for Rehearing in said cause, this Honorable Court having denied petitioners' petition for certiorari on April 14th, 1947, and as grounds for such motion would respectfully show the Court:

I.

This Court has jurisdiction of this cause under Section 2 of Article III of the Federal Constitution and

Section 237 (b) of the Judicial Code as amended by the act of February 13, 1925 (28 U.S.C.A. Section 344 (b)), in that, this controversy is between Mexicans, subjects, and citizens of the Republic of Mexico and citizens of the United States, and involves a construction or interpretation and/or application of the last clause of Article VIII of the treaty of Guadalupe Hidalgo, entered into between the Republic of Mexico and the United States of America, concluded February 2, 1848, wherein and whereby Mexico ceded to the United States all that part of the present State of Texas, lying between the Nueces river and Rio Grande, and substantial and highly important international and national questions are presented to this Honorable Court for determination, because:

1. In denying the claim of petitioners to the land sued for on the sole ground that their claim thereto was barred by Texas' statutes of limitation, the Honorable Circuit Court of Appeals thereby denied your petitioners a right which the United States obligated and bound itself to protect according to the laws of Mexico as they existed at date of the conclusion of said Treaty, as is emphatically shown by the unambiguous language in the first sentence of the last clause of Article VIII of said treaty, which sentence in the treaty in English language reads as follows:— "In said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected", while in the treaty in the Spanish language, it reads:— "Las propiedades en todo genero en los expresados territorios, y que pertenecen ahora a mexicanos no establecidos en ellos, seran respetadas inviolablemente."

Remarks

a. The trial court held that said territory was a part of the State of Texas at the date of said treaty, and the Circuit Court of Appeals in effect, affirmed such holding, but that question has been definitely settled by decisions of this Court; the Supreme Court of Texas and by several acts of the Texas' Legislature as shown in petitioners' Supporting Brief, pp. 18 et-seq. and confirmed by history, see Conclusion of this Motion, all of which conclusively refutes such holding.

b. The word "inviolably" as used in the English language treaty and the word "inviolablemente" as used in the Spanish language treaty (both being originals) are derived from the Latin word "inviolatus" which has a well defined meaning in all civilized lands. (Petitioners discuss the meaning of the word at page 30 of their supporting brief).

c. The result of this law suit rests upon the meaning of the language used in the said first sentence of the last clause of article VIII supra. We have found no case construing the phrase "shall be inviolably respected" as used in said sentence, but there are numerous cases construing the meaning of the phrase "shall remain inviolate" as employed in many state constitutions declaring that the right to a trial by jury shall remain inviolate. Mr. Cooley, in his work on Constitutional Limitations, states that the several constitutions of the states contain ordinations that the right of a jury trial shall remain "in-

violate," and it has been "uniformly held to construe this to perpetuate the right in the cases in which it exists, under the laws in force at the time of the adoption of the particular constitution." (Emphasis ours). Cooley, Const. Lim. 506.

Query.

Are not the two phrases synonymous? We submit that they are, and that the right of the class of Mexicans mentioned were "perpetuated under the existing laws of Mexico."

d. Is it unreasonable to presume that the high contracting parties who framed said treaty, in order to protect the rights of the heirs of those owners, and enable them to inherit when otherwise they could not have done so, framed the second sentence of the last clause of said Article VIII, which reads: "The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if the same belonged to citizens of the United States"? Otherwise the maxim,—"*expressio unius est exclusio alterius*" would apply. Likewise they converted what would have been a defeasible estate into an indefeasible estate. (See our Supporting Brief p. 32, et-seq. also *McKinney v. Saviego*).

2. In denying the claim of the petitioners to the land sued for on the ground that article VIII of said Treaty "does not prevent the passage by the State of Texas of reasonable and non-discriminatory statutes regulating the title and possession of land", said Hon-

orable Circuit Court of Appeals ignored the indubitable fact that Mexico ceded said territory to the United States, and that the United States ceded the same to the State of Texas by the Compromise Agreement of 1850, and that it accepted sovereignty over said territory subject, as of course, to the stipulations of said treaty, and thereby said Court denied your petitioners a right guaranteed to them by the said treaty stipulations, when it, said Court, was duty bound to enforce such right. (State v. Saenz, 47 Tex. 307).

Remarks

Even if the State of Texas had been sovereign over said territory at time of said treaty, yet, the United States, under its treaty making power, would have had authority to protect the rights of alien land owners against Texas' statutes of limitation. (See petitioners' authorities under Point E of Supporting Brief.)

3. In denying the claim of petitioners to the land sued for on the ground that there is no real or substantial distinction "between a statement that property belonging to Mexicans shall be "respected" and a statement that property belonging to Mexicans shall be 'inviolably' respected" said Circuit Court of Appeals ignored the definition of the KEY word "inviolably" as used in the first sentence of the last clause of said article VIII, and thereby denied your petitioners of a right guaranteed to them by said treaty.

4. In denying the claim of the petitioners to the land sued for on the ground that: "Concededly, for a century, Mexico has had no suzerainty over the areas in which these lands are situated. Whether the lands

involved were ceded or conquered, they have been a part of the United States for at last one hundred years and a part of the State of Texas at least since the enactment of the Compromise Agreement of 1850. Whether by cession or conquest, they were split away from the Mexican nation so that there was a substitution of sovereignty under which all laws theretofore in force which were in conflict with the political character and constitutional institutions of the substituted sovereign **lost their force,**" while the treaty contained stipulations to the contrary. (See Point B, Petitioners' Supporting Brief) and this Honorable Court has repeatedly held otherwise, said Appellate Court disregarded said stipulations and the authority of this Court, and by its said act denied your petitioners of a right guaranteed to them by said treaty, and which this Government obligated itself to protect.

5. In upholding the respondents claim to the land sued for under Texas' statutes of limitation, on the basis that to construe said first sentence of the last clause of said article VIII as continuing in force the municipal laws of Mexico as to the class of Mexicans therein mentioned would be violative of the Federal Constitution, said Appellate Court denied your petitioners a right guaranteed to them by said treaty.

6. In upholding the respondents limitation title to the land sued for by petitioners, on the basis that a treaty stipulation must give way to a state constitutional or statutory provision in conflict therewith, said Appellate Court denied your petitioners a right guaranteed to them by said treaty.

7. In affirming the judgment below the Honor-

able Circuit Court of Appeals ignored and refused to apply the fundamental rule that "by the stipulations of a treaty are to be understood its language and apparent intention manifested in the instrument, with a reference to the contracting parties, the subject matter and persons on whom it is to operate." (U. S. v. Arrendo, 6 Pet. 710).

Remarks

The stipulation in Article IX of the treaty, as originally drawn, to the effect that in said ceded territories until states are made of such territories, the inhabitants of such ceded territories "shall be maintained and protected in the enjoyment of their liberty, their property and their civil rights now vested in them according to the Mexican laws," together with the protocol explaining the reason for substituting the present Article IX, clearly shows the intent of the contracting parties as to meaning of the first sentence of the last clause of Art. VIII (See our supporting brief, Point B, p. 237).

II.

The Honorable Circuit Court of Appeals decided each and all of the substantial and highly important international and national questions stated in I, *supra.*, erroneously and contrary to the emphatic language employed in said Article VIII of said treaty; the law of nations and the weight of authority.

III.

This Honorable Court erred in denying petitioners' petition for certiorari, because substantial international

and national questions are involved herein, and said Circuit Court of Appeals decided all said questions erroneously, and denied the title of petitioners to the land sued for on invalid grounds, all of which is more clearly shown in Petitioners' Petition for Certiorari and Supporting Brief to which reference is here made.

CONCLUSION

In order for one to understand the important issues presented for determination, it is necessary to be familiar with the historical back-ground of the boundaries of the State of Texas which was admitted into the Union in 1845. Of course, this Court has judicial knowledge of those facts, and for the purpose of refreshing the court's memory we, as briefly as possible refer to them.

1. Prior to 1821 the territory now composing Texas was under the sovereignty of the kingdom of Spain, which had divided said territory into provinces, namely: The Province of Texas which extended south and west to the Nueces river; the Province of Tamaulipas, which extended from the mouth of the Nueces river to the mouth of Moros creek, and thence south and west across the Rio Grande for complement; the Province of Coahuila, which lay to the west of and adjoined Tamaulipas and west to the east line of New Mexico and south and west across said Rio Grande for complement, and the Province of Chichuachua which lay to the west of Coahuila and south of New Mexico and extended south and west across the Rio Grande.

2. Prior to 1821, the people of the various Spanish provinces, collectively known as New Spain or the Colony of Mexico, including the provinces of Texas,

Coahuila, Tamaulipas, Chihuahua, and New Mexico revolted against the Spanish regime, and in 1821 gained their independence, and thereby each of these provinces became and were independent sovereignties and continued so until they formed the Mexican Confederacy, and created a Mexican Congress, which in turn formed the Mexican Constitution of 1824.

3. By its Constitution of 1824, Mexico divided its territory into sovereign States, including the States of Texas, Tamaulipas, Coahuila, Chihuahua and New Mexico, and Texas and Coahuila were united for political and judicial purposes. Each of these states adopted a constitution and a colonization law.

4 The Constitution of Coahuila and Texas declares "that the boundary of the State is that embraced in the provinces formerly known by the names of Coahuila and Texas." (Laws and Decrees of Coahuila and Texas, p. 313).

5. Likewise the state of Tamaulipas had the same boundaries as the former province of Tamaulipas.

6. Under liberal colonization laws that part of the present State of Texas lying east of the Nueces river was settled, principally with English speaking people.

7. Said State of Texas was divided into municipalities (counties) and the most southern municipality was San Patricio, which extended from the Nueces river north and east for complement.

8. Austin's Map of 1835 shows the boundary of the Mexican State of Texas to extend south and west

to the Nueces river, and west to the east line of New Mexico on the meridian of 103 degrees west of Greenwich. (See Austin's Map in Pocket in Vol. I of John & Henry Sayle's Early Laws of Texas).

9. The west line of Texas at the 103 meridian west of Greenwich is also established by several colonial land grants made by Texas to Samuel J. Wilson and other colonizers, as shown by Sayle's Early Laws of Texas, Arts. 102, 107 and 114, and also by Austin's said Map.

10. The delegates who, on March 2, 1836, in convention assembled, declared the independence of the peoples of the Mexican State of Texas, were selected by the people of each of the municipalities of said State, and, of course, none of the municipalities extended below the Nueces river. (See Worthan's History of Texas, Vol. III, page 219, et-seq.)

11. The decisive battle of San Jacinto was fought April 21, 1836, and thereby the people of Texas achieved their independence.

12. Following the battle of San Jacinto, Santa Ana made two treaties with the conquering Texans, one was a public treaty and the other a secret treaty.

In the public treaty Santa Ana agreed that "The Mexican troops will evacuate the territory of Texas, passing to the other side of the Rio Grande."

In the secret treaty he agreed "to prepare matters in the Cabinet of Mexico, so that the mission that may be sent thither by the Government of Texas may be well received, and that by means of negotia-

tions all differences may be settled, and the independence that has been declared by the convention may be acknowledged," and by article 4 agreed that "A treaty of comity, amity and limits, will be established between Mexico and Texas, the territory of the latter not to extend beyond the Rio Bravo del Norte." (See Wortham's History of Texas, Vol. III, pp. 328-330).

13. On the same day the convention adopted the declaration of independence, it appointed a committee, consisting of one member from each municipality to draft a constitution, which it did.

14. This constitution was adopted by the people of Texas and it in effect converted what had been a part of the sovereign State of Coahuila and Texas into an independent nation, i.e. The Republic of Texas, and its boundaries were the same as the boundaries of the Mexican State of Texas.

15. All history shows that the Republic of Texas never made any pretense or took any steps to show that it was asserting jurisdiction beyond the borders of the former State of Texas under the Mexican Constitution until December 19, 1836, when the Congress of the Republic passed an act declaring that its boundaries extended to the Rio Grande from its mouth to its source.

It will be observed that by this act the Republic asserted sovereignty over all that part of the Mexican States of Tamaulipas, Coahuila, Chihuahua lying north and east of the Rio Grande, and to all that part of the territory of New Mexico lying east of the Rio Grande, including the ancient city of Santa Fe.

16. Mr. Wortham, in his valuable History of Texas, after quoting from the *Telegram* of Houston, Texas, the most widely read newspaper in the State at the time, that "The title of Texas to Santa Fe (before annexation) was as valid as its title to Point Isabel, Laredo and the intermediate towns of the Rio Grande," proceeded to say: "That was so palpably true that it could not be disputed, for the only argument that could be made against the Texas title to Santa Fe was that Santa Fe had never been within the State of Coahuila and Texas, nor within the Province of Texas under the Spanish rule, and that the Republic of Texas had never established jurisdiction over it. The same could be said of Point Isabel and Laredo and the soil on which the battles of Palo Alto and Resaca de Las Palmas had been fought. The territory between the Nueces and Rio Grande had been part of the State of Tamaulipas before the revolution and the government of the Republic of Texas had never exercised jurisdiction over it." (See Wortham's History of Texas, Vol. IV, p. 221).

17. That the Republic was *insincere* in its claim of boundary is evidenced by many facts, thus:

a. The Judiciary Committee of the first Congress of said Republic, on November 21, 1836, to whom had been referred a bill from the Senate "authorizing the President to have the colonization laws translated," recommended the following amendments "strike out all after the word 'to' in the fifth line of the first section, and insert the following: 'Employ a suitable person to translate the colonization laws of Coahuila and Texas, also the colonization laws of the Re-

public of Mexico, so far as they relate to Texas, at as early a date as practicable'." (Journal, 175).

Note: If the Republic had claimed any part of Tamaulipas, it certainly would have had its colonization laws translated.

b. The act of December 22, 1836, establishing the powers and jurisdiction of the district courts and creating judicial districts, only claimed jurisdiction over the country to the Nueces river. (Acts of 1836, 199).

c. The Congress, by its act of 1840 adopted the common law of England and by same act repealed the laws of Coahuila and Texas, but makes no mention of the laws of Tamaulipas. (Sayle's Early Laws of Texas, Art. 707).

d. On December 14, 1837, the Congress of the Republic of Texas passed an act establishing a General Land Office for the Republic, and refers only to lands located by virtue of the colonization law of the State of Coahuila and Texas (Sayle's Early Laws of Texas, Vol. I, Art. 398).

e. A reference to President Houston's veto of the bill establishing a General Land Office, will show he only alludes to the laws and titles of Coahuila and Texas.

f. Then there is the letter dated February 20, 1839, written by the Department of State of the Republic of Texas to Barnard E. Bee, notifying him that the President of the Republic had appointed him Minister Plenipotentiary of the Republic of Texas to Mexico, with carte blanche authority to effect a treaty of

peace, and settlement of the boundary question, and, also, as agent of the Republic to purchase the territory lying between the Nueces and Rio Grande, which letter reads, in part as follows:

"It is hardly to be expected that you will be formally received as Minister Plenipotentiary of this Republic, until a treaty of peace has been made, and the Independence of the country acknowledged. Indeed such a reception would be in itself an acknowledgment of our legitimate existence as a nation and a virtual recognition of our Independence; and as that is more than we can look, or even hope for, until attained by negotiation, you will, in the event of a refusal to receive you as Minister, make your propositions as the agent of this government; and to enable you to do so, separate credentials for this purpose are furnished you.

"Indeed it may be better, not to make known your higher functions, until you have sounded your way as agent, and ascertained whether or not, they will be disposed to treat with you in either capacity; but in this, as in all other matters preliminary to entering upon your negotiations you will be guided by your own judgment and discretion.

"Your powers as agent are plenary, and under them you are fully authorized to negotiate for peace, and to form and sign a treaty securing it, but in making such treaty, you will require the unconditional recognition of the Independence of Texas, and will admit no limits less than those prescribed by the act of Congress entitled 'An act to define the boundaries of the Republic of Texas' approved 19th December, 1836, a copy of which is hereby furnished you.

"These two last points you will regard as a *sine qua non* to any permanent treaty with Mexico; but if you find that it will aid you in the ultimate accomplishments of your objects, to negotiate a treaty of peace and recognition in the first instance, leaving the question of boundary to be subsequently settled in a general treaty of Amity, limits, commerce, navigation and intercourse, you are at liberty to form such a treaty; but in doing so, you must be careful that nothing appears in it which could by any possibility be construed into an intention on the part of this Government, to yield any portion of the Territory claimed by the act of Congress to which I have already refer'd you.

"In negotiating a treaty, having for its immediate objects nothing further than the restoration of peace, and the recognition of our Independence, it will be better if it can be done consistent with the claims of this government, to define the limits at once, as by doing so, you will avoid much embarrassment and discussion in your future negotiations of a general treaty; you will therefore urge the subject as far as you can, without involving the risk of breaking off your present negotiations, and interrupting your future intercourse with the Government.

"Should Mexico express a willingness to establish peace, and recognize the Independence of Texas to the extent of her Original boundaries when forming a part of the Mexican Confederacy, but peremptorily refuse to admit our claims to the entire territory embraced within the limits defined by the act of Congress, you may propose a compromise by negotiating for the purchase of all that portion of it which is not within the original boundaries, at a stipulated price; but the sum to

be thus stipulated for it, must not exceed five Millions of dollars . . . ”

Then the letter refers to the Secret treaty made by Santa Ana and the Cabinet of this Republic, on the 14th of May, 1836, at Velasco, wherein he promised, in consideration of certain favors, to use his best endeavors with his Government to procure a treaty of limits of Texas “not to extend beyond the Rio Bravo del Norte,” and in respect to which the letter instructs Bee how to approach Santa Ana, because the Cabinet of this Republic had not complied with its agreement with him, and admonished Bee that

“It is not contended by this Government that the agreement made with Genl. Santa Ana, while in this country, and a prisoner of war, is legally binding on the Mexican Government;” (Garrison, American Historical Assn. Vol. II, pp. 432-435).

Thereby the Cabinet of the Republic admitted, 1) the two treaties of Velasco, made with Santa Ana while he was a prisoner of war were not binding on the government of Mexico, and 2) that the legal boundaries of the Republic did not extend below the Nueces.

g. Of course Mexico would not and did not sell said belt for the sum of five millions of dollars, or at all.

h. Then, in 1842, the Congress of the Republic enacted the act defining the boundaries of the Republic of Texas to include the two Californias, the whole of the states of Chihuahua and Sonora and the territory of New Mexico, and parts of Tamaulipas, Coahuila, Du-

rango and Sinola. President Houston vetoed the bill. However, Congress passed the bill over the President's veto. (Wortham's History of Texas, Vol. IV, pp. 92-93.)

These are a few of the facts which indubitably refute the contention made by President Polk and also by the courts below that the Republic of Texas always claimed the Rio Grande was her western boundary, in fact they conclusively show that the Republic was not sincere in its claims under the act of December 19, 1836.

It is hard to believe that the Republic would have instructed Bee to purchase the belt from Mexico for a sum not to exceed five million dollars if it had had the least semblance of a legal claim to it.

18. Another point worthy of note is that President Tyler, who expended considerable time and energy to negotiate a treaty with the Republic of Texas for its annexation, recognized the fact that the boundary of the Republic was undefined and a matter of dispute between the Republic and the United States of Mexico, because in his Fourth Annual Message (Dec. 3, 1844) speaking on this question he said:

"Mexico requires a permanent boundary between that young Republic and herself. Texas at no distant day, if she continues separate and detached from the United States, will inevitably seek to consolidate her strength by adding to her domain the contiguous Provinces of Mexico. The spirit of revolt from the control of the Central Government has heretofore manifested itself in some of these Provinces, and it is fair to infer

that they would be inclined to take the first favorable opportunity to proclaim their independence and to form close alliances with Texas. The war would thus be endless, or if cessations of hostilities should occur they would only endure for a season. The interests of Mexico, therefore, could in nothing be better consulted than in a peace with her neighbors which would result in the establishment of a permanent boundary. Upon the ratification of the treaty the Executive was prepared to treat with her on the most liberal basis. Hence the boundaries of Texas were left undefined by the treaty.

19. It should be noted that the Map attached to the trial court's opinion was made in 1844, and it merely evidences the claim Tyler and Polk at that time hoped to make certain by treaty or war.

20. In all probability, these well known facts were instrumental in causing the Congress of the United States to couch its consent for the annexation of Texas in the language that it did. It must be remembered that the Congress of the United States by its joint resolution of January 25th, 1845 consented that "the territory properly included within and rightfully belonging to, the Republic of Texas, may be created into a new State, to be called the State of Texas, etc." Said resolution also contained a proviso that the Government had the power to adjust all questions of boundary that may arise with other governments.

Our Government must have known that the only claim that the Republic had to that part of Tamaulipas below the Nueces was its bold assertion so made by the act of December 19, 1836.

Besides the record shows that President Polk sent John Slidell to Mexico City with full power to "negotiate" for the Nueces strip.

The courts below contended that by the treaty made with Santa Ana in May, 1836, he recognized the Rio Grande as the boundary of the Republic of Texas.

Neither Santa Ana nor Houston so understood that to be the meaning of the Treaty.

It is true the treaty contained an article which reads: "The Mexican troops will evacuate the territory of Texas, passing to the other side of the Rio Grande del Norte."

In a letter from Santa Ana to Houston in November, 1836, he offered his services in settling the boundary question between Texas and Mexico "at the Nueces del Norte, or any other boundary, as may be decided on." (Wortham, Vol. III, pp. 376,377).

In fact, Houston ordered Santa Ana to move the Mexico troops below the Rio Grande and as far south as Monterrey. (See Houston's Letter to Santa Ana, Yoakum's History of Texas, Vol. II, p. 550).

21. Mexico recognized the Republic of Texas, as an independent nation with its boundaries extending to the Nueces and east line of New Mexico. This fact is evidenced by the following:

When General Taylor was encamped on the upper bank of the Rio Grande, opposite Matamoros, General Ampudia, then in command of the Mexican forces

stationed at Matamoras, notified General Taylor to break up his camp within twenty-four hours and to retire beyond the Nueces river, and in the event of his failure to comply with these demands, announced that arms, and arms alone must decide the question.

In a clash between General Taylor's forces and those of General Arista, who had succeeded to the command of the Mexican forces, in a region near the present site of Brownsville, the American forces were defeated, and based upon such clash, President Polk induced Congress to and it did declare war on Mexico, which war continued until concluded by the treaty of Guadalupe Hidalgo.

Lincoln Speaks on the Subject

22. It is well at this point to note the observations made by A. Lincoln while he was a member of the Congress of the United States. On January 12, 1848 he declared in Congress that "the war with Mexico was unnecessarily and unconstitutionally commenced by the President." He spoke of his impressions of how he and others believed they ought to behave while their country was engaged in a war they considered unjustly commenced. "When the war began, it was my opinion that all those who because of knowing too little, or because of knowing too much, could not conscientiously oppose the conduct of the President in the beginning of it should nevertheless, as good citizens and patriots, remain silent on that point, at least until the war should be ended." Now he was forced to break silence; the President was telling the country, continually, that votes of the Whigs for supplies to the soldiers in the field were an endorsement of the President's conduct of the war. Then, too, the President was hold-

ing back documents and information to which the public was entitled.

Lincoln had earlier introduced resolutions and demands that the President should locate the exact "spot" where the war began. He now accused the President of marching an American army out of the proven American territory into land not established as American soil, and there shedding the first blood of the war. The President was attempting "to prove by telling the truth what he could not prove by telling the whole truth." (Extract from Sanburg's Abraham Lincoln, Volume One and Two, Chapter 75, pp. 366, 367).

23. In furtherance of his plan, Polk appointed Trist as a commissioner, with full powers, etc., to accompany the army into the interior of Mexico and negotiate a peace treaty by which certain territory, including a part of the State of Tamaulipas, would be ceded to the United States.

This situation is expressed in correspondence between Mr. Trist and the President, wherein he, speaking of certain insurmountable difficulties, remarked:

"The States of Sonora and Chihuahua, which adjoin New Mexico, had solemnly protested against the transfer of a single foot of their territory, and against the validity of any such grant, if made.

"This was, therefore, a sine qua non with the Mexican Government; and one which it was absolutely impossible that it could depart from, even if it was ever so strongly disposed to do so; because it would have rendered the ratification of the treaty an impossible thing. Not only would the delegations from those States

have opposed it, but it could not have obtained a single vote in its favor. If there be, in this country one sentiment more universal and decided than any other (and this without special reference to our country, and the designed imputed to her) it is the one which denies the possibility of a valid transfer by the General Government, of any portion of the territory of one of the Sovereign States. It is set forth with great clearness by the Puros (or war-until-annexation party) in the Manifesto referred to in my Dispatch of the 26th December, as constituting 'the last stand made by them, in the character of members of the expiring Constituent Congress, against the consummation of the measure (a Treaty of Peace) upon which the government is known to them, and to everyone, to be intent'. Nor does it avail to urge against this denial of authority in the Genl. Government, the supreme law of necessity; for it is fortified at this point also. It says, if the Union, after having exhausted all its means in the defense of its members, finds itself incapable, let the portion of the Republic, with respect to which the impossibility of defense exists, be abandoned for the time. But this inability gives no right to the Union to alienate any portion of any State; whether it be for the purpose of purchasing peace for the rest, or any other purpose whatever. No such alienation can be valid.

"Thus insurmountable was the obstacle to the adoption of the parallel of 32 deg. as the boundary. The only particular, in respect to which it was practicable to overstep, this limitation to the transfer of territory, is the small portion of the State of Tamaulipas, lying North of the Rio Bravo, and running a short distance up that river; which strip of country (extending either to the Nueces or as far as San Antonio—I do not

recollect which, and have not the reference at hand) just as certainly constituted a part of that State, and not of Texas, at the time when the latter declared her independence, as it is certain that the counties of Accomack and Northampton do now constitute a part of the State of Virginia and not Maryland. Tamaulipas, however, has not made any protest on the subject; and it is believed that the boundary will be silently acquiesced in by her, and that in view of the extreme peculiarity of the case under every aspect, this departure from the principle will not be made a point of by them in favour of peace." (Miller, Treaties, Vol. V, p. 305).

It is obvious that Mr. Trist and the Mexican Commissioners agreed upon all of the territory to be ceded to the United States except the territory lying between the Nueces River and the Rio Grande. This is clearly shown by the following correspondence between the plenipotentiaries of Mexico and Mr. Trist, the commissioner for the United States: Under date, August 29th, 1847, the Mexican government in its instructions to the commissioners appointed to negotiate a treaty with the United States Commissioner, N. P. Trist, and in which we find the following language: "It is supposed they know that if greater advantage cannot be drawn from the territory of Texas, they must adopt the opinion of the government, who believe that no further concession shall be made than the limits of Texas, and in no manner does its limits reach to the river Bravo," which means the Rio Grande. (See Public Pamphlets, Vol. 2, p. 331).

And in a note addressed by said Commissioners to Mr. Trist, dated September 6, 1847, we find the following more emphatic language:

"In our conference we have informed your excellency that Mexico cannot cede the belt which lies between the left bank of the Bravo and the right of the Nueces. The reason ascertained for this is not alone the full certainty that such territory never belonged to the state of Texas, nor is it founded on the great value in the abstract, which is placed upon it. It is because that belt, together with the Bravo, forms the natural barrier for Mexico, both in a military and commercial sense, and the barrier of no state ought to be sought, and no state can consent to abandon its barrier. But in order to remove all cause for trouble hereafter, the government of Mexico engages not to found new settlements or establish colonies in the space between the two rivers, so that, remaining in its present uninhabited condition, it may serve as a safeguard equally to both republics. Pursuant to our instructions, the preservation of this territory is a condition, *sine qua non*, of peace."

24. Bear in mind that the trial Court held that said territory was not "ceded" territory, and based such holding on 1) the act of December 19, 1836, which act was repudiated both by the Legislature of Texas and the Supreme Court of Texas, as well as by this Court. We refer the Court to *Clerk v. Hiles* in which the court stated that said act "was not considered a matter of sufficient importance to deserve attention," and 2) on the Treaties with Santa Ana (while in du-rance vile), and which even the Congress of the Republic attached no importance, and 3) on the case of *McKinney v. Saviego* (The head note of which states that the treaty does not apply to any part of Texas) but the opinion reads: "We think it clear that it (Art. VIII) did not refer to any portion of the acknowledged

limits of Texas." Which clearly shows that there was an unacknowledged portion of Texas.

We respectfully refer the Court to our list of authorities cited at page 18 et-seq. of our supporting brief.

Compromise Agreement of 1850

If Texas did not get sovereignty over said territory by said Compromise Agreement of 1850, then it has no sovereignty over said territory. Let us look at the facts.

When President Polk was wooing Texans his contention was that the boundary of Texas extended to the Rio Grande from its mouth to its sources, but when the treaty was concluded and he had accomplished his purpose, he and his successor, President Taylor repudiated that statement and contended that all that part of New Mexico lying east of the Rio Grande was "never a part of Texas but was "conquered" territory.

Notwithstanding this fact the Texas administration created counties (on paper) in said eastern part of New Mexico, and attempted to organize courts in that territory, but the American forces at Santa Fe thwarted this attempt, which caused bitter feeling in Texas and threats of war against the United States.

Mr. Wortham, the historian, in reporting on this incongruous situation summed up the situation in these words:

" . . . to contend that it was not Texas soil at the moment of annexation would be to condemn President Taylor himself and the American Government. It would be to contend that

Taylor's march from the Nueces to the Rio Grande was an invasion of Mexican territory and thus justify the action of the Mexicans in attacking him . . . " (Wortham, *A History of Texas*, Vol. IV, p. 219 et-seq.)

In the meantime another complication arose. In early 1850 a mass meeting was called to convene in Brownsville, Texas, to, and it did convene for the purpose of and it did prepare a petition to the Congress of the United States to make either a state or a territory out of that part of the state of Texas lying between the Nueces river and Rio Grande, as said treaty provided. But no further steps were taken as the controversy between Texas and the United States was settled on September 9, 1850 by said Compromise Agreement, whereby Texas became sovereign of the territory between the Nueces river and Rio Grande. (See *State v. Saenz*, 47 Texas 307).

Respondents' Authorities Analyzed

Great stress is laid by respondents on *Todock v. Union State Bank* (Their brief pp. 10-11), which simply holds that, notwithstanding the treaty with Norway, Knudson, an alien, could not come into Nebraska and acquire a homestead without complying with the state's homestead law. Suppose a Mexican alien of the class mentioned in Article VIII should come into Texas and purchase land, he would necessarily be subservient to Texas' land laws, and said treaty stipulatio would be no protection against such.

Then at page 11 they say "This Court has held that laches may bar rights guaranteed by a treaty." But the doctrine of laches is inapplicable to a legal title,

and the treaty there considered had no clause similar to said Article VIII.

It should be observed that only a Mexican can invoke the said stipulation, and several of the cases cited are by persons of other nationality.

At page 12 they assert that these (Texas' statutes of limitation) were regulations which the conquering authority ordained, making it thereby appear that Texas conducted the war ~~with the United States~~.

It is fundamental that neither the Congress of the United States nor the Legislature of Texas could take away or invalidate an existing title. (Baldwin v. Goldfrank, Sup. Ct. of Texas, 31 S. W. 1064; State v. Saenz, 47 Texas 307, construing acts of Texas' Legislature of 1850, 1852, 1854, 1860 and 1870 and stated that their object

"... was to ascertain what lands belonged to individuals, whether the titles from the former government were perfect or imperfect, and to have them surveyed, mapped and patented,, but not to interfere with any superior rights that might have been acquired by third persons previous to the passage of the laws ..

"A claimant may rely on the validity of his title under the laws of the State, including the treaty of Guadalupe Hidalgo, which is binding as a law, without availing himself of the benefit of a suit under this law . . . "

In McKinney v. Saviego (Our supporting brief p. 36) this Court with elaborate detail pictured the sit-

uation of alien Mexicans under Texas' law at time of the treaty.

It is not uncommon for a treaty to allow non-resident aliens privileges in regard to real property, which are denied them under a law of the state where such property is located. (Under Point E, p. 41 of our supporting brief we have discussed this question, with authorities sustaining that assertion.

[REDACTED]

This suit is one of the most important that has ever arisen in the United States. The title to millions of acres of land situated in the vast territory ceded by Mexico to the United States by the treaty of Guadalupe Hidalgo, and claimed under grants from Spain or Mexico, rests upon the decision of this Honorable Court in this case, and if such is contrary to petitioners contention, the action of Arbitrators, if arbitration is resorted to under the express stipulations of Article XXI of said treaty to the effect that if a controversy arises as to the meaning of any stipulation in said treaty, such controversy shall not result in reprisals on that account, but may be, at the request of either government, submitted to arbitration by Commissioners or friendly nations, etc.

Wherefore, petitioners most respectfully pray that on rehearing this Honorable Court set aside its denial of the petition for certiorari; that it grant its writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit as prayed for in said petition for certiorari; and upon such hearing that the judgment below be reversed and judgment be here entered in favor of petitioners for the title and possession of the land sued for by them, with instructions to the trial

court to take an account of the rents and profits of said land, or in the alternative that the judgment below be reversed and the cause be remanded with instructions, and petitioners pray for their costs.

Respectfully submitted,

D. B. CHAPIN,
P. O. Box 256,
Mission, Texas
Attorney for Petitioners

ELLERY GARLAND BROWN,
Corpus Christi, Texas

LEWIS B. PERKINS,
Washington, D. C.
Counsel for Petitioners

I, D. B. Chapin, attorney for petitioners, certify that in my opinion the foregoing Motion for Rehearing is well founded in law and that the same is proper to be presented and filed, and is not interposed for delay.

D. B. CHAPIN,
Attorney for Petitioners

A true copy of above motion has been delivered to counsel for the respondents.

D. B. CHAPIN,